IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 114 of 1979

For Approval and Signature:
Hon'ble MR.JUSTICE Y.B.BHATT
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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

BABUBHAI HARGOVANDAS

Versus

HEIRS OF PRAHALADBHAI S. - RADHABEN WD/O PRAHALADBHAI

Appearance:
MR RC JANI for Appellant
MR MI PATEL for Respondent No. 1

CORAM : MR.JUSTICE Y.B.BHATT
Date of decision: 27/01/97

ORAL JUDGEMENT

1. This is a Second Appeal under section 100 CPC, wherein the appellant is the original plaintiff and the respondents are the original defendants.

2. Before proceeding with the merits of the matter, it is necessary to examine the scope and ambit of an appeal under section 100 CPC.

3. The scope of section 100 CPC, and the powers of

the High Court while exercising jurisdiction as a second appellate court are by now well demarcated and require no detailed discussion. The Supreme Court has, in the case of

(i) Ramaswamy Kalingaryar Vs. Mathayan Padayachi (AIR 1992 Supp (1) SCC page 712),

(ii) Kashibai w/o of Lachiram (2) 1995(7) JT (SC) 48 and

(iii) Parsini (dead) through Legal Representatives Vs. Atma Ram (AIR 1996 SC 1558),

clearly reiterated the principle that the High Court cannot, while functioning as a second appellate court under section 100 CPC, upset the findings of fact recorded by the lower appellate court by reassessing the evidence, or reassess the qualitative value of such evidence on record, and thus cannot reverse such findings of fact. In fact, the High Court cannot interfere with such findings of fact even by examining or reappreciating the evidence from the aspect of " sufficiency of proof ".

4. The relevant and pertinent facts leading to the present appeal are as follows.

5. The plaintiff had filed suit against the defendants contending that he is the owner of a house bearing Panchayat No. 3/35 in the village Balol taluka Mehsana, and that the houses of the defendants are opposite his house, bearing Panchayat Nos. 3/32 & 3/33. The plaintiff averred that in the front of his house and on the western side he has some land of his ownership, and the defendants have no right to use the disputed open land situated on the eastern side of the defendants' houses and situated on the western side of the plaintiff's house, and inspite of this, the defendants have attempted to open doors in the back walls of their respective houses (in the eastern wall of the defendants' houses). The plaintiff, later amended the suit plaint and averred that inspite of the fact that the defendants have no right to open doors and windows on the land between the houses of the parties, the defendants have in fact, opened such doors and windows as also constructed a hanging balcony overlooking the disputed land, and prayed for the mandatory injunction to close down the said doors and windows and demolish the balcony, and for a permanent injunction restraining the defendants from putting up such doors, windows and/or balcony.

6. The defendant no.2 did not resist the suit, whereas the defendant no.1 filed his written statement at ex.23 and a further written statement to the amended plaint at ex.69. The substantial contentions taken therein, for the purposes of the present appeal, were to the effect that the land lying between the houses of the respective parties i.e. on the east of his house and to the west of the plaintiff's house is the land which vests in Gram Panchayat, and the said land is in fact, a street land and does not belong to the plaintiff. The defendant no.1 further contended that the door in the eastern wall of his house has not been recently put up in violation of the plaintiff's rights as averred in the plaint, but has existed since times immemorial.

7. The trial court, after framing issues at ex.31, and after appreciating the total evidence on the record, held in favour of the plaintiff mainly on the basis that the disputed land is of the ownership of the plaintiff, and that the defendant no.1 had failed to prove that the eastern wall of his house had existed since the times immemorial. The defendant no.1 therefore, being aggrieved by the decree passed by the trial court, preferred Regular Civil Appeal No. 141/77 under section 96 CPC. The lower appellate court, on a total reappeciation of the evidence on the record, and on hearing the learned counsel for the respective parties, was pleased to allow the appeal of the defendant no.1 and consequently dismissed the plaintiff's suit.

7.1 The original plaintiff has therefore, preferred the present appeal.

8. As already discussed hereinabove, it is not open to this Court to reappreciate the evidence, even for a limited purpose or even from a different perspective.

9. However, to satisfy the conscience of this Court, I have examined such evidence once again. The map of the disputed street land ex.51 is one of the major materials, on the basis of which other evidence has to be weighed and appreciated.

9.1 Ex.50 is a testamentary document namely; a will dated 29th March, 1943, under which the defendant no.1 inherited the property which he holds at present. Under the said will, it is found that there is a recital in completely unambiguous terms that the eastern boundary of the said house has been described as having a door opening in the mandavi, and just ahead of the mandavi there was a public way. This will was executed in the

year 1943 lying prior to the disputes between the parties. This aspect has not been dealt with by the plaintiff, who otherwise averred and attempted to lead evidence to show that there was no entrance on the eastern side of the 1st defendant's house, but the entrance was on the western side. However, it is relevant to note in this context that learned counsel for the plaintiff, during the course of hearing of the appeal before the lower appellate court, fairly conceded that the recital in the said will was correct, and that in fact, the 1st defendant's house had, from the very beginning, its entrance on the eastern side of the said house. Even without recourse to this admission or concession, the lower appellate court has rightly observed that the permission granted by the panchayat to the defendant no.1 for opening a door leading out of his house, pertained to opening a door on the western side of the house, and not in the eastern side. Obviously, if the defendant no.1 opened an entrance to his house on the western side for the first time in 1954, it is obvious that he must have been using, prior to that, an entrance preexisting on the eastern side, particularly, inasmuch as it is nobody's case that there is any entrance either on the northern or the southern side.

9.2 The parallel evidence in the form of a title deed at mark 81/1 of the year 1933 in favour of the plaintiff's father, clearly establishes that a public way has been described therein as lying on the western boundary of the plaintiff's house. Thus, these two documents clearly establish that there was a public passage or a way between the plaintiff's house and that of the 1st defendant's house, atleast since 1933 if not earlier.

9.3 The lower appellate court was completely justified in interpreting the oral evidence of the plaintiff, where in his cross-examination, he was compelled to admit that formerly there was also a mandavi in the front of his house i.e. on the western side of his house, and that at present on the date of the deposition, there is no such mandavi. This therefore, establishes the contention of the defendant no.1 that the plaintiff has covered the mandavi in front of his own house.

9.4 In the context of both the pleadings of the respective parties, as also in the context of the prayers sought for by the plaintiff, it cannot be overlooked that the plaintiff had sought for the reliefs prayed for in the suit, the foundation of which was an averment that he

was the owner of the land lying on the western side of his house. As rightly held by the lower appellate court, the plaintiff has failed to discharge his heavy burden of proof, which lay upon him. In fact, the lower appellate court was justified in concluding that although once upon a time, the land between the houses of the respective parties was of mandavi land, but the plaintiff has trespassed upon the same by extending the boundaries of his house on the western side and has thus, covered the mandavi in front of his house.

9.5 The oral evidence led by the parties does not by itself, lead to any significant conclusion except the admissions referred hereinabove, and I am inclined to agree with the conclusions drawn therefrom by the lower appellate court. In the premises aforesaid, it is not possible to hold that the lower appellate court was in error in recording a finding of fact that the disputed land situated on the western side of the plaintiff's house was not of the ownership of the plaintiff, and consequently, no rights could be asserted by the plaintiff as against the defendants on this basis.

9.6 Learned counsel for the appellant has sought to rely upon a decision of this court in the case of Parmar Gogji Kana (9 GLR 1060). This decision merely lays down a general principle, and this principle is obviously not open to controversy. However, the said decision must be read in the context of the facts established on record of any given case. It cannot be blindly applied to any and all facts. Even otherwise, the said decision lays down, on the facts of that case, that since the plaintiff failed to establish ownership over the open space in front of the defendant's house, the normal presumption would be that the defendant is the owner of the said space, and therefore there can be no claim of the plaintiff's adversely holding it. On the facts of the present case, this principle, even when accepted, would have no application inasmuch as the disputed strip of land is in front of both the houses of the parties. In other words, it is both in front of the plaintiff's house as also in front of the defendant's house. Thus, no presumption can be raised either way, and the entire controversy has to be settled on the facts and evidence of the case, as has been done by the lower appellate court.

10. In the premises aforesaid, since I concur with the findings of fact recorded by the lower appellate court on a total appreciation of the evidence on record,

I find that no substantial question of law arises in the present appeal. This appeal is therefore, dismissed with no order as to costs.

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